

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 38622/10
Masum BADAY
against Turkey

The European Court of Human Rights (Second Section), sitting on 13 March 2012 as a Chamber composed of:

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Işıl Karakaş,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 31 May 2010,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Masum Baday, is a Turkish national who was born in 1981 and is currently being detained in Tekirdağ Prison pending the outcome of proceedings against him. His application was lodged on 31 May 2010. He is represented before the Court by Mr M. Erbil and Mrs N. Selçuk, lawyers practising in İstanbul.

The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 10 May 2004 the applicant was arrested by the police on suspicion of throwing molotov cocktails into two buildings.

On 12 and 13 May 2004 the applicant gave statements before the public prosecutor and a duty judge at the İstanbul State Security Court. The applicant was reminded of his right to legal assistance under Article 135 and 136 of the former Code of Criminal Procedure but made his defence in the absence of a lawyer. On both occasions the applicant denied the charges. Before the investigating judge, the applicant also said that although he had challenged the accuracy of the accusations during his questioning by the police, it had nevertheless been written in the record that the applicant had exercised his right to remain silent. Having regard to the state of the evidence, the investigating judge released the applicant pending trial.

On 18 May 2004 the public prosecutor lodged a bill of indictment against the applicant, charging him with membership of the Workers' Party of Kurdistan (the PKK), an illegal armed organisation, and using explosives.

Following the abolition of the State Security Courts by Law no. 5190, the criminal proceedings were resumed by the Istanbul Assize Court (2004/166E).

On 22 September 2004 the Assize Court, having regard to the nature of the offence and the state of the evidence, and to the fact that the applicant had absconded, ordered his detention *in absentia*.

On 14 March 2006 the applicant was arrested in Batman and placed in detention by the Batman Magistrates' Court.

On 28 May 2007 the Istanbul Assize Court found the applicant guilty as charged, sentenced him to three years and nine months' imprisonment and imposed a fine. The court also ordered the continuation of his detention pending examination of his appeal.

Between 9 June 2006 and 28 May 2007, the applicant's continued detention was examined at the end of every hearing and, in any case, at thirty-day intervals. On each occasion, the Assize Court extended his detention. The court considered that other measures would be ineffective, having regard to the maximum sentence foreseeable for the offence in question, the persistence of a risk of the applicant fleeing or tampering with evidence, the fact that the offence was one of the offences listed in Article 100 § 3 of the Code of Criminal Procedure and the strong suspicion that he had committed the offence he was charged with.

On 27 January 2009 the Court of Cassation quashed the judgment on the ground that the applicant's first defence submissions had been obtained before the bill of indictment had been read out.

On 19 August and 11 December 2009, the Istanbul Assize Court held two hearings at which the applicant and his defence counsel were present, and on the latter date it convicted the applicant once again as in its previous judgment. The court again decided to keep him in detention. The case file does not contain any document which shows that the applicant objected to the extension of his detention. Nor does the applicant make any claim that he did so.

On 18 July 2011 the Court of Cassation reversed the judgment a second time, considering that further assessment of whether the applicant's acts could also be construed as attempted homicide was necessary.

The case was remitted to the Istanbul Assize Court and the proceedings are still pending. The applicant is in detention pending their outcome.

COMPLAINTS

Relying on Article 5 § 3 of the Convention, the applicant complained that the length of his detention during the proceedings had been excessive, that the domestic courts had repeatedly extended his detention using identical, stereotyped terms, and that there were two to four-month intervals between the hearings.

The applicant also complained under Article 5 § 5 of the Convention that the domestic law provided no enforceable right to compensation for his complaints under Article 5.

The applicant contended under Article 6 § 1 that the criminal proceedings against him were not concluded within a reasonable time and that the Assize Court failed to act with due diligence.

Relying on Article 6 § 3 (c) and (d), the applicant further alleged that he had been denied access to legal assistance while in police custody and did not have the opportunity to question the complainants heard in his absence.

Lastly, relying on Article 13 of the Convention the applicant alleged that the domestic system provided no effective remedy for his complaints under Articles 5 and 6.

THE LAW

1. The applicant maintained under Article 5 § 3 of the Convention that the length of his detention pending the outcome of the proceedings had been excessive and that the courts had refused to release him on stereotypical grounds. The applicant also complained under Article 5 § 5 of the Convention that he had been unable to obtain compensation for the alleged violation of Article 5 § 3.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with the Rules of Court, to give notice of this part of the application to the respondent Government.

2. Relying on Articles 6 § 1 and 13 of the Convention, the applicant argued that the criminal proceedings against him had not been concluded within a reasonable time and that there was no effective domestic remedy in that respect.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

3. The applicant further argued under Article 13 of the Convention that there had been no effective domestic remedies to challenge the length of his detention.

The Court finds it appropriate that the applicant's complaints under Article 13 of the Convention should be examined from the standpoint of Article 5 § 4. The Court observes that there is nothing in the case file which suggests that the applicant objected to the extension of his detention on 11 December 2009, when the first-instance court convicted him. It was the sole decision complained of and remaining within the six-month time-limit. Even assuming that Article 5 § 4 was applicable after his conviction, taking into account that where a sentence of imprisonment is imposed after conviction by a competent court, the supervision required by Article 5 § 4 is in principle incorporated in the decision of the court (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12), Turkish law in fact provided for a review to which the applicant failed to resort and he does not specify why such a review would not have been effective.

It follows that this part of the application should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

4. Finally, relying on Article 6 § 1 of the Convention, the applicant contended that no lawyer had assisted him when he had been questioned by the police officers and that the complainants had not given testimony in his presence during the hearings before the first-instance court.

The Court notes that, according to the information in the case file, the criminal proceedings against the applicant are currently pending before the Assize Court. For this reason, this complaint is premature and must, therefore, be rejected for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention (see, for example, *Koç v. Turkey* (dec.), no. 36686/07, 26 February 2008).

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the length of his detention, the absence of a right to compensation for the alleged breach of Article 5 § 3, the length of the criminal proceedings against him and the absence of a remedy for the allegedly excessive length of the proceedings.

Declares the remainder of the application inadmissible.

Stanley Naismith
Registrar

Françoise Tulkens
President